Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

KIMBERLY SAAVEDRA, as Special Administrator of the Estate of Jan Ingvar Roland Hjalmarsson, deceased, and OLGA HJALMARSSON, Individually and as Parent and Natural Guardian of Olivia Hjalmarsson, a minor, and Alexander Hjalmarsson, a minor,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the drafters of the Warsaw Convention intend the venue requirements of Article 28 to be amenable to waiver after "the damage occurred" and/or to be extinguished under the terms of Article 25 by reason of the defendant carrier's wilful misconduct?

2. Is the lower court's interpretation of Article 28, to the effect that non-compliance with its terms divests the court of federal subject matter jurisdiction, incompatible with "[t]he judicial Power of the United States . . . vested . . . in such inferior Courts as Congress may . . . ordain and establish" [Art. III U.S. Const.]?

3. Where the defendant carrier raises the Warsaw Convention as an affirmative defense, thereby placing at issue the locus and termini of the decedent passenger's contract of carriage, does the burden rest with the carrier to prove the treaty's applicability and non-compliance with its venue provisions by production of and reference to a true copy of the passenger tickets defendant carrier contends evince the decedent's contract of carriage?

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Petitioners Kimberly Saavedra as nominal plaintiff and Olga Hjalmarsson as surviving wife of decedent Jan Hjalmarsson respectfully petition this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 3, 2000.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at App. A, la. That opinion affirmed the decision of the District Court of the District of Columbia dated May 17, 1999, which is also unreported and is reproduced at App. B, 3a. The order of the Court of Appeals denying rehearing is reproduced at App. C, 12a.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari was filed within ninety (90) days of entry of the order of the Court of Appeals dated April 17, 2000, denying Petitioner's timely filed Petition for Rehearing. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

U.S. Constitution, Article III, Sections 1 and 2 (App. D, 16a)

Warsaw Convention, formally titled "Convention for the Unification of Certain Rules Relating to International Transportation by Air," 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11, Articles 25, 28, 32 (App. D, 16a-17a)

STATEMENT OF THE CASE

Petitioners' case is one of the two last remaining passenger death actions arising out of the Korean Air Lines Flight 007 air disaster of September 1, 1983 which took the lives of the 269 persons aboard the aircraft. More than 12 years after joinder of issue and more than 6 years after it was adjudged guilty of wilful misconduct [*see In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991)], defendant Korean Air Lines Co., Ltd. (KAL) moved pursuant to Fed. R. Civ. Proc. Rule 12(b)(1) to dismiss the Hjalmarsson Complaint upon the grounds the action against KAL lacked a treaty nexus with the United States within the meaning and requirement of Article 28 of the Warsaw Convention. This because KAL is based and domiciled in South Korea and because Nigeria was said to be decedent's final destination and the place where decedent entered into the contract of carriage. [1]

Following an evidentiary hearing held before it on January 7, 1999, the district court granted the motion in an opinion order dated May 17, 1999 (App. B, 3a). In sum, the district court concluded petitioners failed to overcome the presumption that decedent's transportation aboard KAL Flight 007 was subject to a contract of carriage allegedly entered into in Nigeria with British Caledonian Airways (BCA) for round the world travel from and return to Nigeria.

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1. In pertinent part, Article 28 requires that plaintiff commence suit "in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court of the final destination."

The judgment of the district court was summarily affirmed on March 3, 2000 by the United States Court of Appeals for the D.C. Circuit (App. A, la) and, on April 17, 2000, petition for rehearing was denied (App. C, 12a).

Petitioners contend the district court erred in equating the venue requirements of Article 28 (commonly called treaty jurisdiction) with the subject matter jurisdiction vested in district courts by Congress pursuant to its enumerated powers [U.S. Const. Art. I, Sec. 8, C1. 9] and existing by virtue of the judicial powers of the United States [U.S. Const. Art. III, Sec. 1]. This error resulted in the district court unfairly assigning the burden of proof to the party opposing the motion and wrongly treating an affirmative defense as matter that could not be waived or abandoned by any act or inaction on the part of the moving party. This despite treaty language (Art. 32) and industry practice to the contrary and despite KAL's inordinate and unexcused delay in seeking summary relief. Further, petitioners contend KAL's wilful misconduct entitles them to the application of local law without recourse to the provisions of the Warsaw Convention limiting or excluding the carrier's liability. Lastly, petitioners contend the locus and termini of decedent's contract of carriage should not have been resolved in KAL's favor without it producing a copy of decedent's tickets.

Decedent Hjalmarsson was a 38 year old Swedish national with business interests in Sweden, Nigeria and the United States, among other countries. When not abroad or engaged in business travel, Mr. Hjalmarsson resided with his American wife and children at their family home in Queens, New York. On August 3, 1983, decedent journeyed to New York from his place of business in Nigeria in order to be present for his son's birth, due the next day. Except for

a business trip to Tampa, Florida, he remained with his family during the month of August until the night of his departure from Kennedy Airport aboard KAL Flight 007. As observed by the district court, "[e]xactly how Jan Hjalmarsson came to be aboard Flight KE007 will never be known" (App. B, 9a). This because KAL was unable to produce a copy of a ticket coupon applicable to passenger Hjalmarsson's transportation aboard Flight 007.

During the course of consolidated discovery on the matter of the KAL 007 passenger tickets, KAL announced it was unable to produce copies of the flight coupons collected from the 007 passengers at the time of boarding because those coupons were carried aboard the aircraft for transmittal to KAL's Revenue Accounting Department in Seoul. Thus, the coupons normally used as evidence of the passengers' individual contracts of carriage were lost together with the aircraft and its occupants. In place of the missing flight coupons, KAL produced copies of the audit coupons in most of the passenger actions.[2] Although no KAL audit or agent coupon was found for passenger Hjalmarsson, inquiry by KAL disclosed that Nigeria Airways had issued tickets to Mr. Hjalmarsson for a direct flight from Nigeria to New York on August 3, 1983 with open flights thereafter within the United States and return to Nigeria via Stockholm and Amsterdam. Upon obtaining copies of the Nigeria Airways tickets and noting the absence of any Far East segments (App. E, 18a), KAL's counsel made an informal request to petitioners' counsel for whatever might be available

2. KAL ticket booklets have four basic coupons: The flight coupon is collected from the passenger at the time of boarding, the audit and agent coupons are detached at time of sale and retained by the carrier for accounting and record keeping purposes and the passenger coupon serves as the passenger's receipt.

concerning decedent's transportation. By transmittal note dated January 27, 1984, a coded writing written on the letterhead of Transcap Travel Bureaux Nigeria was forwarded to defense counsel without any representation as to the writing's purpose, authenticity or reliability. Nothing further was heard from KAL or its counsel about the Transcap writing until a copy of it appeared 12 years later as an exhibit to KAL's Rule 12 motion (App. F, 19a). With the passage of time, the attorney who produced the Transcap writing no longer recalled from whom or how it was acquired and nothing in the office file served to refresh counsel's recollection. During the evidentiary hearing held by the district court on January 7, 1999, Mrs. Hjalmarsson reaffirmed her deposition testimony to the effect that she had no knowledge of the exhibit's origin, purpose or content and never saw the Transcap writing until a copy of it was shown to her by defense counsel.[3]

KAL's Rule 12(b)(1) motion was supported by a conclusory affidavit executed by KAL employee Young Bae Kim who conceded he had no first or second hand knowledge of the Transcap writing but nevertheless interpreted it to indicate that open tickets on British Caledonian Airways (BCA) ticketstock were issued to Mr. Hjalmarsson in Nigeria on August 2, 1983 for round the world travel from and return

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3. The Transcap writing's original purpose is not known. Although it has been characterized as an itinerary, an invoice and a receipt, it is none of these. It is not an itinerary in the usual sense that travel agencies furnish itineraries because it is coded. For example, the issuing carrier is said to be identified by the numerals "121". The Transcap writing is not an invoice because it indicates payment in cash. Nor is it a receipt since the ticket booklet given to the passenger at the time of sale contains a coupon that serves as the passenger's receipt.

to Nigeria with stops in London, New York, Los Angeles and Seoul, among other places. Although it was conceded the Transcap exhibit did not indicate flight on KAL Flight 007, Mr. Kim theorized that tickets reflected by the Transcap writing could have been used to board Flight 007 if decedent first obtained an endorsed approval of the change from either BCA as the issuing carrier or Trans World Airways (TWA), the carrier on the flight between New York and Los Angeles that would have been substituted. KAL's inability to locate passenger Hjalmarsson's audit or agent coupon led Mr. Kim to conclude decedent boarded Flight 007 without new tickets being issued and that decedent, instead, used BCA tickets that Mr. Kim assumed were modified by KAL and endorsed by either BCA or TWA.[4]

The district court ruled in advance of the evidentiary hearing that petitioners bore the burden of proving compliance with the terms of Article 28. In effect, this required that petitioners prove the ticket transaction resulting in Mr. Hjalmarsson's transportation aboard Flight 007 created a treaty nexus with the United States, either by novation or by the purchase or issuance of new tickets.

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4. There is no record evidence that BCA tickets were actually used by decedent, modified by KAL or ever endorsed by either BCA or TWA. Any use of BCA tickets to board Flight 007 would have been an initial use of those tickets because decedent used his Nigeria Airways tickets to travel to New York. Moreover, under the circumstances hypothesized by Mr. Kim, KAL was required by its and the industry's mandatory ticketing procedures to issue new tickets. As conceded by Mr. Kim, the absence of an audit coupon for passenger Hjalmarsson could be explained by loss or its transmittal to Seoul on Flight 007. Testimony by another KAL employee indicates the agent coupons for Flight 007 were routinely discarded after a period of time.

Petitioners objected to the Transcap writing as inadmissible hearsay and argued that the party relying upon the *Warsaw Convention* is obliged to prove the treaty's applicability by producing a true copy of the applicable passenger tickets. Petitioners also presented evidence to the effect that KAL's ticket scenario was not only unlikely, but would have required issuance of new tickets under the mandatory ticketing procedures of KAL and the airline industry.

Relying upon the Transcap writing, as interpreted by KAL, the district court concluded decedent's transportation aboard Flight 007 was subject to a contract of carriage entered into in Nigeria with BCA for round the world travel from and return to Nigeria and that the transaction conducted in New York between KAL and decedent was a mere modification that did not create a treaty nexus with the United States.

Although the Transcap writing was the evident linchpin to KAL's Rule 12 motion, being described as ". . . the only and best evidence available of decedent's contract of transportation . . ."[5] and although the district court resolved every contested issue of fact in favor of KAL on the basis of the Transcap writing, the Court of Appeals, in summarily affirming the district court, nevertheless concluded the outcome would have been the same if it were assumed the Transcap writing was inadmissible and that KAL bore the burden of proving the Treaty's applicability.

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5. Despite its characterization by KAL counsel, the Transcap writing is not evidence of decedent's contract of carriage. It is, at most, evidence of the **issuance** of **evidence** of **a** contract (ticket) that, on its face, is not relevant to transportation aboard Flight 007.

REASON FOR GRANTING THE WRIT

The action for passenger Hjalmarsson's death was dismissed because the district court: (1) erroneously equated the treaty's venue requirements with Article III subject matter jurisdiction; and (2) relied upon that misinterpretation to resolve "jurisdictional" facts in favor of a carrier that, in seeking summary relief six years after it was adjudged guilty of wilful misconduct, failed to produce the tickets it contends evinced decedent's contract of carriage. Rectification of a bad result does not itself warrant certiorari. However, this Court's review is necessary and appropriate because the result below perpetuates a gross misinterpretation of a treaty of the United States, which, if left uncorrected, will adversely impact on the rights of passengers traveling in international air transportation.

I.

NO FEDERAL PRECEDENT FOR THE DISTRICT COURT'S RULINGS

Research fails to disclose any federal precedent for the following rulings made by the district court in this case:

1. The holding that an air carrier's affirmative (treaty) defense under Article 28 cannot be waived despite the carrier's unexcused delay of 12 years in seeking summary relief, the language of the treaty permitting such waiver (Art. 32) and the practice of the industry to the contrary;

2. The shifting of the burden of proof from the proponent of the affirmative treaty defense to the party opposing the motion when the proponent is guilty of inexcusable delay

and fails to produce a copy of the passenger ticket it contends evinces the contract of carriage;

3. The granting of the carrier's motion to dismiss the Complaint six years after movant was adjudged guilty of wilful misconduct within the meaning of Article 25;

4. Resolving "jurisdictional facts" bearing upon the applicability of the Warsaw Convention and the situs and termini of the contract of carriage on the basis of inadmissible evidence offered and received in lieu of a copy of the passenger tickets where the failure to produce the tickets was attributable at least in part to movant's wilful misconduct in the operation of the aircraft;

5. Accepting movant's version of the ticket transaction conducted in New York without consideration of or reference to mandatory ticketing procedures of the industry to the contrary.

II.

THE JUDICIAL POWER OF THE UNITED STATES CANNOT BE ABROGATED OR LIMITED BY TREATY

A. The Error Complained Of is One of Erroneous Interpretation

The essential error of the district court was interpreting the venue requirements of Article 28 of the Warsaw Convention as limiting the judicial power of the United States. By equating "treaty jurisdiction" with the subject matter jurisdiction vested in the Judiciary under Article III

of the United States Constitution, the district court wrongly attributed to the former the unique features of the latter with the result that the burden of proof was misplaced and a defense that may be waived under the Treaty's terms (Art. 32) was deemed to be incapable of waiver.

B. The Treaty Making Power of the Executive is Limited by the Constitution and the Separation of Powers Doctrine

Article 28 does not and, consistent with the separation of powers doctrine, cannot be correctly interpreted to divest the Judiciary of the powers existing by virtue of Article III of the U.S. Constitution and vested in the district courts pursuant to the enumerated powers of Congress [U.S. Const. Art. I, Sec. 8, C1. 9].

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government itself and of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids . . .

Geofroy v. Riggs, 133 U.S. 258, 267, 10 S. Ct. 295 (1890), *citing Fort Levenworth R.R. v. Lowe*, 114 U.S. 525, 541(1885). "To be sure, 'no agreement with a foreign nation can confer power on . . . any . . . branch of Government, which is free from the restraint of the Constitution,' " *Holmes v. Laird*, 459 F.2d 1211, 1217 (D.C. Cir. 1972), *quoting Reid v. Covert*, 354 U.S. 1, 16, 77 S. Ct. 1222 (1957). Although "Treaties made . . . [are] the supreme Law of the Land" [Art. VI, U.S. Const.], their provisions effecting domestic law are

"subject to the same substantive limitations as any other legislation . . . [Otherwise] constitutional limitation on governmental power could be circumvented by means of a treaty although the same objective could not be accomplished through legislation", *In re Aircrash in Bali, Indonesia on April 22, 1974, sub nom Causey v. Pan American World Airways*, 684 F.2d 1309 (9th Cir. 1982). "[T]he subject matter jurisdiction of the lower federal courts is determined by Congress, 'in the exact degrees and character which to Congress may seem proper for the public good' ", *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989), *citing Cary v. Curtis*, 44 U.S. 236, 11 L. Ed. 576 (1845) and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099 (1982).

C. The Pleadings Define Federal Subject Matter Jurisdiction and the Burden of Proof Assumed by Defendant Air Carrier

As alleged in petitioners' Complaint, federal subject matter jurisdiction exists by virtue of the diverse citizenship of the parties within the meaning of 28 U.S.C. § 1332 and by reason of the applicability of the Death on the High Seas Act (DOHSA), 46 U.S.C. § 764, *et seq.*, and the provisions of 28 U.S.C. § 1331. In its Answer to the Complaint, KAL raised the Warsaw Convention in a series of separately alleged affirmative defenses, among them being the provisions of Article 28.

D. "Treaty Jurisdiction" Distinguished

Four levels of jurisdiction are said to come into play in a case subject to the Warsaw Convention. Lawrence B.

Goldhirsch, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK, Martinus Nijhoff Publishers, Dordrecht (1988), pp. 141-143. Preliminarily, the party pleading the Warsaw Convention must show the treaty applies under its terms, *Alexander v. Pan Am. World Airways*, 757 F.2d 362 (D.C. Cir. 1985); and that is normally done by recourse to the passenger tickets as evidence of the contract of carriage, *Tolson v. Pan Am. World Airways, Inc.*, 399 F. Supp. 335 (S.D. Tex. 1975); *see also Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874 (W.D. Pa. 1965). The treaty's proponent must establish that the contract between the parties contemplated "international transportation" within the meaning and definition of Article 1(2) of the Convention, *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Grey v. American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). Jurisdiction at this threshold level is referred to as "Convention jurisdiction" in contradistinction to "treaty jurisdiction" which pertains to the venue requirements of Article 28, James D. MacIntyre, *Destination Jurisdiction Under the Warsaw Convention*, 60 J. AIR LAW & COM. 657 (1995), at 670 n.59. Overlaying convention and treaty jurisdiction are the due process requirements of *in personam* jurisdiction and the statutory and/or the constitutional limits of the court's subject matter jurisdiction, *P.T. Airfast Services, Indonesia v. Superior Court*, 139 Cal. App. 3d 162, 167 (1983), *citing Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971).

E. The Interpretation of Article 28 has Evolved into Something Not Intended by the Treaty's Drafters

The general acceptance by American courts of the jurisdictional nature of Article 28 may be traced to the Second Circuit's opinion in *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798. Until 1971, our courts were evenly divided in characterizing Article 28 as pertaining to either jurisdiction or venue. See, in this regard, the discussion of cases in *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d at 800 n.5; particularly, *Spencer v. Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S.D.N.Y. 1962). Uncertainty about the nature of Article 28 was recognized by C.J. Oakes in the *Smith* opinion, wherein it was stated:

> The language of the Article itself does not refer to jurisdiction, international or domestic, or to venue. Thus we must look outside the Article to ascertain the intention of the drafters. Of little help to us are the unofficial and contradictory labels put on Article 28 in various reprints of the Convention.
>
> * * * *
>
> Discussions by the delegates who drafted the Warsaw Convention as to the nature of Article 28 do not assist us, since there is no indication that the use of the word "jurisdiction" was made in the technical sense with which we are ordinarily concerned. Nowhere in the discussions does a concept so local as venue appear, and we have no indication that the drafters of Article 28 were concerned about, or indeed familiar with, the American court system and its conceptions of "jurisdiction" and "venue".

452 F.2d at 800-01.

As observed by D.J. Van Pelt Bryan in *Spencer*:

> I cannot conceive that it was the design or effect of Article 28, drafted in contemplation of adherence by many nations with widely divergent systems of jurisprudence and court structure, to deal with questions of technical subject matter jurisdiction within the framework of the federal judicial system of the United States or impinge upon the jurisdiction conferred by Congress upon the federal courts.

201 F. Supp. at 507. Nevertheless, in the three decades since the Second Circuit concluded Article 28 was "jurisdictional in nature", the treaty's venue provision has undergone an evolution in nomenclature. Characterized originally as having to do with "treaty jurisdiction", *Smith*, 452 F.2d at 800, Article 28 evolved into something that "speaks to subject matter jurisdiction", *Gayda v. Lot Polish Airlines*, 702 F.2d 424, 425 (2d Cir. 1983), and eventually into a provision that not only governs subject matter jurisdiction, *Wyler v. Korean Air Lines Co.*, 928 F.2d 1167, 1174-75, 289 U.S. App. D.C. 75 (1991), but forms the basis of subject matter jurisdiction, *Klos v. Polskie Linie Lotnicze (Lot Polish Airlines)*, 133 F.3d 164, 167 (2d Cir. 1997). The drift towards equating "treaty jurisdiction" with federal subject matter jurisdiction can be seen by contrasting the following comment about the nature of Article 28. The first was made by a California court in 1983. The second by a United States District Court eight years later.

By the California Court of Appeals, Third District:

> There has been a split of authority in the meaning of Article 28. The federal courts have held that the convention provides only "treaty jurisdiction" and not subject matter jurisdiction or in personam jurisdiction. According to this view the initial inquiry is whether one of the four situs requirements of Article 28, subdivision (1) has been met. If so then the United States may be a proper country in which to bring the action. Such a finding however, does not mean that a particular court within the country may hear the action. Questions of subject matter jurisdiction and personal jurisdiction over the defendant must still be resolved by reference to the domestic laws of the jurisdiction of the particular court.

P.T. Airfast Services, Indonesia v. Superior Court, 139 Cal. App. 3d at 167, *citing Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d at 800.

By the United States District Court for the Eastern District of New York:

> This provision [Art. 28] is jurisdictional in nature and the points of jurisdiction it specifies are national in scope [*citing Smith, supra*]. If in any given action, the United States is not one of the fora specified by Article 28, the federal Courts lack treaty jurisdiction under the Convention and **therefore federal subject matter jurisdiction** over the controversy.

In re Air Disaster Near Cove Neck, New York on January 25, 1990, 774 F. Supp. 732, 733 (E.D.N.Y. 1991) (emphasis added), *citing Gayda v. Lot Polish Airlines*, 702 F.2d at 425.

Six years after the district court's opinion in the Avianca air disaster litigation, the notion that non-compliance with Article 28 divests the court of "federal subject matter jurisdiction" was expressed by the Second Circuit's panel in *Klos v. Lot Polish Airlines*, wherein it was said of Article 28: "If the action is not brought in one of these four jurisdictions, the court does not have subject matter jurisdiction over it", 133 F.3d at 167, *citing In re Alleged Food Poisoning Incident, March 1984*, 770 F.2d 3, 5 n.2 (2d Cir. 1985).

F. Article 28 Limits Choice Not Jurisdiction

Petitioners take no issue with the effect to be given Article 28 when non-compliance with its mandate is timely raised and proven on the basis of admissible evidence offered and received in a manner consistent with due process. Under those circumstances (not present in this case), petitioners accept (for the purposes of this petition) that Article 28 ". . . must be considered as absolute and mandatory . . . in the jurisdictional sense . . .", *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d at 801, quoting McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR LAW & COM. 205, 226, n.7; and *see*, in addition to Courts of Appeal cases cited previously, *Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817 (9th Cir. 1995); *Swaminathan v. Swiss Air Transport Co.*, 962 F.2d 387 (5th Cir. 1992); *Kapar v. Kuwait Airways Corp.*, 269 U.S. App. D.C. 355, 845 F.2d 1100 (1988); *Petrire v. Spantax, S.A.*, 756 F.2d 263 (2d Cir. 1985). But its effect, however characterized in terms jurisdictional, does not transform Article 28 into something not intended by the Treaty's drafters and forbidden by the Constitution.

1. *The Drafters' Original Intent*: As is evident from its text, Article 28 is addressed to the limits on the choice a plaintiff may make in selecting a venue for the action against the defendant carrier. It is not addressed to the jurisdiction of the courts of the "High Contracting Parties". The limitation is one of venue rather than fora because Article 28 does not delineate any specific court or courts other than to require that suit be commenced in a court "in the territory of one of the High Contracting Parties". Thus, the right of election is national in scope, *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966) with "[q]uestions of procedure [to] be governed by the law of the Court to which the case is submitted" [Art. 28(2)]. Since the United States did not participate in the work done by the interim Comite International Technique d'Experts Juridique Aeriens (CITEJA) and only observed but did not participate in the proceedings resulting in the drafting and signing of the Warsaw Convention in 1929, S.M. Speiser and C.F. Krause, AVIATION TORT LAW, Vol. I, Ch. 11:4, p. 638, The Lawyers Co-Operative Publishing Co., Rochester (1978), it cannot be said ". . . it was the design or effect of Article 28 . . . to deal with questions of technical subject matter jurisdiction within the framework of the federal judicial system of the United States or impinge upon the jurisdiction conferred by Congress upon the federal courts", *Spencer v. Northwest Orient Airlines, Inc.*, 201 F. Supp. at 507.

The purpose of Article 28, as originally intended and as disclosed by the remarks of the delegates to the Warsaw Conference, was to adjust the conflicting interests of contracting parties. In the view of British Delegate Orme Clarke, the intent of Article 28 was to protect the carrier from the "inconvenience" and "difficulty" of defending itself in "far-off lands" where the injury or damage may have

occurred, pp. 189-190 of the MINUTES OF THE SECOND INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, October 4-12, 1929, Warsaw, Poland. The carrier's interest in not having to defend itself in "far-off lands" was counter-balanced by giving the passenger the option to bring suit where the contract was made or at the place of the expressed destination in addition to the place or places of the carrier's domicile and principal place of business.

Another indication that Article 28 was not aimed at divesting courts of jurisdiction is the evident import of Article 32 which, in pertinent part, states:

> Any clause contained in the contract and all special agreements entered into **before the damage occurred** by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or altering the rules as to jurisdiction, shall be null and void . . .

(emphasis added).

"This article impliedly permits the parties to agree to anything, including applicable law and jurisdiction after damage occurs . . .", Goldhirsch, *supra*, at p. 173. In keeping with the maxim *expressio unis est exclusio alterius* (expressing one thing excludes the other), "[a] statute often speaks as plainly by inference as in any other manner . . ." *Weill v. State*, 250 Ala. 328, 334, 34 So. 2d 132 (Sup. Ct. 1948). Obviously, since federal subject matter jurisdiction cannot be supplied by agreement of the parties, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 702, 102 S. Ct. 2099; *Sosna v. Iowa*, 419 U.S. 393,

95 S. Ct. 553 (1975); *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390 (1972), the quasi-jurisdictional nature of Article 28 is substantially different from and cannot be equated with subject matter jurisdiction existing under Article III of the U.S. Constitution. The two are substantially different because they serve different purposes. Federal subject matter jurisdiction "represents a restriction on judicial power . . . as a matter of sovereignty", *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. at 2104. By contrast, Article 28 represents a venue restriction, one arising out of a contract between private parties that does not purport to divest any court of jurisdiction but merely conditions the plaintiff's right to invoke the jurisdiction of courts "in the territories of the High Contracting Parties". As such, Article 28 is an affirmative defense that serves a purpose wholly different from "a matter of sovereignty" in the limited, highly technical and unique sense of Article III subject matter jurisdiction. The uniqueness of Article III jurisdiction is traceable to and inseparable from the fact that, consistent with our nation's formation as a republic, "[t]he courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by common law", *Cary v. Curtis*, 44 U.S. 236, 245, 11 L. Ed. 576, 3 How. 236 (1845).

2. *Industry Custom and Practice*: That "treaty jurisdiction" may be conferred by agreement of the parties and/or by waiver on the part of the carrier is an accepted practice in the industry. Article 28 is seen as a condition of contract that exists within the context of a private law treaty, *Block v. Compagnie Nationale Air France*, 386 F.2d at 330-31. For most of its 70 year history, the Warsaw Convention has served the airline industry mainly, if not exclusively as an affirmative defense; one that may, but need not be raised

and, if raised, may be waived or abandoned. Thus, for example, where the defendant air carrier has reached a funding agreement with its codefendant, as occurred recently in the cases arising out of the crash of Swissair Flight 111, Article 28 venue requirements may and will be waived as part of the agreement between defendants and their insurers.[6]

The notion that Article 28 does not constitute subject matter jurisdiction is shared by the U.S. Department of Transportation (DOT) which urged the airline industry to voluntarily adopt the so called "fifth jurisdiction" by adding the passenger's domicile to the plaintiff's choice of venue. In approving the 1996 IATA Intercarrier Agreement on Passenger Liability waiving monetary limits, the DOT expressed the following reservation:

> We are disappointed in the absence of a consensus for carrier submission to the fifth jurisdiction . . . [I]nclusion of the fifth jurisdiction would have gone a long way towards meeting the Department's guidelines to the extent that protection of U.S. citizens and permanent residents would apply wherever the ticket was purchased, or wherever the flight took place.

[DOT Order 96-11-6 WL 656334 (DOT 11/12/96), quoted in the Report of the Committee on Aeronautics of the

6. *In re Air Crash Near Peggy's Cove on September 2, 1998* (E.D. Pa. MDL 1269). At the initial organization meeting held before C.J. James T. Giles of the Eastern District of Pennsylvania on August 5, 1999, Desmond T. Barry, Esq., as attorney for Swissair, stated, at p. 26 of the hearing transcript: "We are going to waive the Article 28 defense in respect of American citizen plaintiffs." Mr. Barry and his firm, Condon & Forsyth, represented KAL in the consolidated cases arising out of the 007 disaster during the period between 1983-1992.

Association of the Bar of the City of New York, titled *Warsaw Convention Revisited*, RECORD OF THE ASSOCIATION, Vol. 54, No. 3, 319, 326-27 (January, 1999).][7] That the fifth jurisdiction was under consideration and, indeed, urged upon the airline industry by the DOT is a clear indication that Article 28 does not relate to subject matter jurisdiction in the strict constitutional sense but is, instead, a treaty defense that may be waived.

III.

KAL'S WILFUL MISCONDUCT DEPRIVES IT OF THE TREATY'S PROTECTION

In pertinent part, Article 25 of the Warsaw Convention states: "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct. . . ." The meaning and scope of Article 25 was left unanswered by this Court in its most recent decision dealing with the Warsaw Convention, *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999). This because the issue was not preserved by respondent Tseng. *Id.* at 167 n.10. However, as observed by Mr. Justice Stevens in his dissenting opinion, *id.* at 178:

> The Convention, however, does not preempt local law in cases arising out of "wilful

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7. The 1996 IATA Intercarrier Agreement will be supplanted when the Montreal Convention is ratified by 32 nations. The Montreal Convention was signed by 52 countries on May 28, 1999. When ratified, it will replace the Warsaw Convention, do away with monetary limits, add the fifth jurisdiction and provide for strict carrier liability for passenger death or injury up to an amount equivalent to approximately $135,000 U.S. currency.

> misconduct". Article 25 expressly provides that a carrier shall not be entitled to avail itself of the provisions of the Convention that "exclude or limit" its liability if its misconduct is willful.

The foregoing, it is respectfully submitted, accurately states the intended effect of Article 25 on all treaty defenses in Chapter III, including Article 28. Lower court rulings to the contrary are based on the erroneous belief "treaty jurisdiction" and Article III subject matter jurisdiction are the same.

IV.

WHERE THE LOCUS AND/OR TERMINI OF THE CONTRACT OF CARRIAGE ARE AT ISSUE, THE CARRIER IS NOT ENTITLED TO RELIEF UNDER ARTICLE 28 WITHOUT PRODUCING A COPY OF THE PASSENGER'S TICKETS

The party relying upon the provisions of the Warsaw Convention bears the burden of proving that the treaty applies to the transportation in question, *Alexander v. Pan Am. World Airways, Inc.*, 757 F.2d 362; *Donkor v. British Airways Corp.*, 62 F. Supp. 2d 963 (E.D.N.Y. 1999); *Tolson v. Pan American World Airways, Inc.*, 399 F. Supp. 335; *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874. This is particularly true when the treaty is raised as an affirmative defense because "[t]he general rule is that the burden of proof lies where the pleadings place it. . . .", *Welsh v. United States*, 844 F.2d 1239, 1245 (6th Cir. 1988). Since the treaty's applicability depends upon the termini in "the contract made by the parties" [Art. 1(2)], *Grey v. American Airlines*, 95 F. Supp. 756; *Block v. Compagnie Nationale Air France*,

386 F.2d 232; *Grein v. Imperial Airways, Ltd.* (1937), L KB 50-CA (1936), 2 All Eng Rep 1258, at 1288; Unoff Rptd 1 CCH Avi 622, the issue must be resolved on an individual rather than a collective basis. The fact that the Treaty governed the transportation of most or all of the other 007 passengers does not establish its applicability to passenger Hjalmarsson's transportation ". . . since the points of departure and destination must be determined by the 'stipulations' made by the parties", H. Drion, LIMITATIONS OF LIABILITY IN INTERNATIONAL AIR LAW, M. Nijhoff, The Hague (1954), at p. 54.

Where there is an issue of fact as to the locus and/or termini of the contract of carriage, the tickets are controlling over the unevinced intent of the parties, *Klos v. Lot Polish Airlines*, 133 F.3d 164. When the treaty's terms are raised affirmatively, as was done in this case by KAL, the burden rests with the defendant carrier to establish not only the treaty's applicability but also that tickets were delivered in accordance with the requirements of Article 3(1).

This because, in air disaster litigation:

> The airline is in the best position to show delivery, having access to its own records and copies of tickets sold **and actually used** for passenger travel . . . The passenger, in contrast, may have been severely injured or killed in the accident. As a practical matter, the passenger's burden may be nearly insurmountable. . . .

Manion v. Pan American World Airways, Inc., 55 N.Y.2d 402, 449 N.Y.S.2d 693, 696-97 (1982) (emphasis added).

There is no evidence in this case to indicate the tickets, if any, delivered to and/or used by decedent to board Flight 007 met the requirements of Article 3(1) which, among other particulars, requires "[a] statement that the transportation is subject to the rules relating to liability established by [the] convention" [Art. 3(1)(e)]. As one writer observed:

> Normally, after an air crash, the passenger no longer has possession of his ticket. The carrier, having the burden of proving the existence of the contract as well as delivery of the ticket will usually resort to producing the coupon that it pulled just prior to that leg of the flight.

Goldhirsch, *supra*, at p. 29. It is not known what tickets decedent used to board Flight 007 because KAL adhered to the unusual, if not irregular business practice of transmitting the passenger flight coupons to Seoul on the very same flight covered by the coupons. Thus, as a consequence of KAL's wilful misconduct in the operation of Flight 007, the evidence of decedent's contract of carriage was lost together with the aircraft and its occupants.

Despite its culpability in failing to produce a copy of the tickets actually used by decedent to board Flight 007, KAL was permitted to rely instead on a double hearsay document that it characterized as ". . .the only and best evidence of decedent's contract of transportation. . . .". In fact, the Transcap writing is not evidence of decedent's contract or of any contract of carriage. It is, at most, inadmissible evidence of the issuance of a ticket that decedent didn't use to fly to New York and that, on its face, would not have applied to Flight 007 unless changed in the manner hypothesized by KAL. Even at that, the ticket transaction

hypothesized by KAL would have created a treaty nexus with the Untied States sufficient for the purposes of Article 28. This because the alleged use of BCA tickets would have involved a change in route and carriers and, according to the Official Airline Guide (OAG), a change in fare in addition to the need for a refund for the unused portion of the BCA tickets. The mere change in routing required KAL to issue new tickets according to the IATA Ticketing Handbook governing industry and KAL ticketing procedures. In short, the ticket transaction hypothesized by KAL and accepted by the lower courts necessarily involved a novation.

In view of the foregoing, and considering particularly the defendant carrier's inordinate and unexcused delay in moving for relief, KAL's Article 28 motion should not have been granted in the absence of a copy of the ticket KAL contends evinced the contract of carriage.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia and, ultimately, to vacate and reverse the order below and remand the matter to the District Court for trial of damages.

Respectfully submitted,

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Counsel of Record
SPEISER, KRAUSE, NOLAN & GRANITO
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(212) 661-0011

APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND FILED MARCH 3, 2000

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7105
September Term, 1999

Kimberly Saavedra, as Special Administrator of the Estate of Juan Ingvar Roland Hjalmarsson, deceased, and as Personal Representative of Olga Hjalmarsson for Olivia Hjalmarsson, a minor, and Alexander Hjalmarsson, a minor,

Appellant

v.

Korean Air Lines Co., Ltd.,

Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 83cv09240)

Before: WILLIAMS, GINSBURG, and ROGERS, *Circuit Judges*.

JUDGMENT

Appendix A

This cause came on to be heard on appeal from a judgment of the District Court, and was briefed and argued by counsel. The Court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

Ordered and Adjudged that the judgment of the district court is affirmed. Assuming in appellant's favor that the burden of proof was on defendant to show the application of the Warsaw Convention, and assuming that the district court erred in admitting the Transcap document, the court is not in "grave doubt" that (and does not believe that) any such error had "substantial influence" on the outcome. See *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 844 (D.C. Cir. 1981).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Eva Brown
Deputy Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MAY 17, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2940 (AER)

KIMBERLY S. SAAVEDRA, as Administrator of the Estates of **JAN INGVAR ROLAND HJALMARSSON,** Deceased,

Plaintiff,

v.

KOREAN AIR LINES CO., LTD.,

Defendant.

MEMORANDUM OPINION

This action is presently before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction. Upon consideration of the entire record, and for the reasons stated below, the Court will grant the motion and dismiss the action for lack of jurisdiction.

I Background

The parties agree that Jan Ingvar Roland Hjalmarsson was a passenger on Korean Air Lines (KAL) Flight KE007,

which was shot down by the air force of the former Soviet Union on September 1, 1983. The parties disagree, and the record is sparse, as to how Mr. Hjalmarsson came to board that ill-fated flight. The question of what tickets he used has some importance because, under the Warsaw Convention,[1] it determines where his personal representative can file suit, and possibly even whether the Warsaw Convention applies to this case. The Court allowed Plaintiff extensive time for discovery and held an evidentiary hearing on January 7, 1999 to resolve disputed questions of fact. Having carefully evaluated the testimony presented at the hearing and given due weight to the exhibits in evidence, the Court now enters findings of fact and conclusions of law as to the question of the subject matter jurisdiction of this Court. *See* Fed. R. Civ. P. 52; *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197-98 (D.C. Cir. 1992).

II. Findings of Fact

1. Jan Ingvar Roland Hjalmarsson ("Hjalmarsson" or "Decedent") purchased airline tickets for extensive international travel from a Nigerian travel agent, Transcap Travel Bureaux Nigeria ("Transcap").

2. At the time he purchased his airline tickets, Hjalmarsson intended to begin and end his travel in Port Harcourt, Nigeria, with intermediate stops in the United States, Great Britain, the Republic of Korea, and other countries.

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 1502 (1976)).

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3. At all relevant times Nigeria was a High Contracting Party to the Warsaw Convention.

4. Hjalmarsson telephoned KAL Reservations on August 26, 1983 and indicated he would be traveling on KAL Flight KE007 and that he was in possession of his ticket.

5. On September 1, 1983, Hjalmarsson was a passenger on KAL Flight KE007 which was shot down en route to Seoul, Korea from New York, New York by military aircraft of the Soviet Union.

6. The parties have been unable to locate ticket coupons used by Hjalmarsson in boarding Flight KE007.

7. Hjalmarsson was traveling on KAL Flight KE007 pursuant to the contract for round trip transportation from Port Harcourt, Nigeria, which he had entered into when he bought tickets from Transcap.

8. Specifically, Hjalmarsson exchanged the tickets he was issued by Transcap for travel from New York to Los Angeles, and from Los Angeles to Seoul for a boarding pass for Flight KE007, New York to Seoul non-stop

III. Conclusions of Law

Defendant moves to dismiss the Complaint for lack of subject matter jurisdiction. Plaintiff alleges that jurisdiction exists under the diversity statute, the Death on the High Seas Act, and the Warsaw Convention. Plaintiff bears the burden of establishing the subject matter jurisdiction of the Court.

See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). Furthermore, "no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted).

The Warsaw Convention applies to decedent's travel aboard Flight KE007 because he was engaged in "international transportation" within the meaning of the Convention. Decedent's place of departure and place of destination were both within the territory of a High Contracting Party, Nigeria, and his trip involved several stops within territories subject to other sovereignties.[2] *See* Warsaw Convention Art. 1(2); *see also* Art. 1(3) ("Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed on under the form of a single contract or of a series of contracts . . .").

The Court finds that it is the agreement of the parties to transport a passenger by aircraft for hire which invokes the terms of the Convention. A passenger ticket, while evidence of a contract for carriage, is not the contract and is not a necessary prerequisite for application of the Convention. *See* Warsaw Convention, Art. 3(2) ("The absence, irregularity,

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2. The Court notes that the Convention would apply even under Plaintiff's theory that Decedent purchased a new ticket in New York.

or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."); *Boyar v. Korean Air Lines*, 664 F. Supp. 1481, 1485 (D.D.C. 1987) (citing *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967)).

The Warsaw Convention constitutes Plaintiff's exclusive remedy for all causes of action arising out of the downing of Flight KE007. *See* Warsaw Convention, Art. 24; *El Al Israel Airlines v. Tseng*, 119 S. Ct. 662, 668 (1999) ("recovery for a personal injury [suffered on board an aircraft] if not allowed under the Convention, is not available at all."). Plaintiff's claims under the Death on the High Seas Act, and any state law tort claims, are preempted by the Convention.

It follows that the only possible source for the jurisdiction of this Court over Plaintiff's claims is the Convention itself, and in particular Article 28. If the Court does not have jurisdiction pursuant to Article 28 then the Court lacks jurisdiction over Plaintiff's claim. *See Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 167 (2d Cir. 1997); *Wyler v. Korean Air Lines*, 928 F.2d 1167, 1175. (D.C. Cir. 1991).

Article 28(1) provides that

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a

> place of business through which the contract has been made, or before the court at the place of destination.

It is clear that jurisdiction in the United States will not lie under three of these possible locales. The domicile and principal place of business of Korean Air Lines are in Korea, *see Wyler*, 928 F.2d at 1175, and the United States was clearly not Decedent's place of destination. The only real question is whether Decedent made a contract for transportation within the United States.

The Court finds that Decedent made his contract for travel before he left Nigeria. The fact that the dates of specific travel were left open, that he may have later changed specific legs of his journey and that his journey was expected to last an extended period of time, do not alter the fact that he purchased round trip transportation originating in Port Harcourt, Nigeria. *See* Warsaw Convention Article 1(2); *Haldiman v. Delta Airlines*, No. 98-7135, slip op. at 4-5 (D.C. Cir. March 12, 1999); *Boyar*, 664 F. Supp. at 1485-87.

It is the Court's view that Defendant intended to make a round trip from Nigeria and purchased tickets which enabled him to make a round trip from Nigeria.[3] It was that transaction which established a contract for international transportation under the Convention. While the Court finds that it is most likely that Decedent converted tickets for the N.Y.-L.A. and

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3. It is worth noting that the Nigeria Airways tickets, which Decedent had apparently bought before the Transcap tickets for travel within the United States and Europe, also reflected round trip transportation originating in Port Harcourt, Nigeria.

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L.A.-Seoul flights into a N.Y.-Seoul boarding pass, the exact transaction by which he boarded KE007 cannot be determined with any certainty at this late date. However, the exact transaction is relatively unimportant for the purposes of the Convention.

> [A]n airline ticket evidences a highly modifiable contract. . . . Therefore in most situations, where a passenger enters into a contract for air transportation but decides to take a flight that is in some way not represented by the passenger ticket issued to him or her, the passenger and the airline merely modify the original contract rather than enter into a whole new one. Under these circumstances, the place of business through which the contract has been made remains unchanged. *Boyar*, 664 F. Supp. at 1485-86 (citations and internal quotation marks omitted).

The Court concludes that Decedent merely modified his contract for transportation in New York, and that he was still traveling pursuant to the contract he had entered into in Nigeria. Accordingly, jurisdiction for this action does not lie in the United States pursuant to Article 28 of the Warsaw Convention and the case must be dismissed for lack of subject matter jurisdiction.

IV. Conclusion

Exactly how Jan Hjalmarsson came to be aboard Flight KE007 will never be known. The Court has made findings of fact based on the available evidence. The Court finds that

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Plaintiff has not been able to establish that Decedent made a new contract in New York to board KAL Flight KE007. Rather, the Court concludes that Decedent was on board pursuant to the contract for transportation which he made in Nigeria. Accordingly, there is no basis to bring this action in the United States under the Warsaw Convention and the action must be dismissed. An appropriate order issues this same day.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Court

Dated: May 17, 1999

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2940 (AER)

KIMBERLY S. SAAVEDRA, as Administrator of the Estates of **JAN INGVAR ROLAND HJALMARSSON,** Deceased,

Plaintiff,

v.

KOREAN AIR LINES CO., LTD.,

Defendant.

ORDER

Upon consideration of the pleadings and the evidentiary record in this case, and for the reasons stated in the accompanying Memorandum Opinion, it is by the Court this 17th day of May 1999,

ORDERED, that Defendant's motion to dismiss is hereby granted; and it is

FURTHER ORDERED, that this action is hereby **DISMISSED** for lack of jurisdiction.

s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Court

APPENDIX C — PER CURIAM ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 17, 2000

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7105
September Term, 1999
83cv02940

Kimberly Saavedra, as Special Administrator of the Estate of Juan Ingvar Roland Hjalmarsson, deceased, and as Personal Representative of Olga Hjalmarsson for Olivia Hjalmarsson, a minor, and Alexander Hjalmarsson, a minor,

Appellant

v.

Korean Air Lines Co., Ltd.,

Appellee

BEFORE: Williams, Ginsburg, and Rogers, Circuit Judges.

ORDER

Upon consideration of appellants' petition for rehearing filed March 29, 2000, it is

Appendix C

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7105
September Term, 1999
83cv02940

Kimberly Saavedra, as Special Administrator of the Estate of Juan Ingvar Roland Hjalmarsson, deceased, and as Personal Representative of Olga Hjalmarsson for Olivia Hjalmarsson, a minor, and Alexander Hjalmarsson, a minor,

Appellant

v.

Korean Air Lines Co., Ltd.,

Appellee

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Appendix C

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Henderson did not participate in this matter.

APPENDIX D — CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

This case involves Article III of the U.S. Constitution and provisions of the treaty of the United States commonly called the Warsaw Convention and formally titled "Convention for the Unification of Certain Rules Relating to International Transportation by Air", concluded at Warsaw, Poland on October 12, 1929 [49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1034)]. In pertinent part, the text of Article III and the subject treaty provisions are as follows:

U.S. Constitution
Article III

Section. 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . ."

* * * *

Section. 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made . . . to all Cases of admiralty and maritime Jurisdiction; to Controversies . . . between citizens of different states . . ."

Warsaw Convention
Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier

or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of Procedure shall be governed by the law of the court to which the case is submitted.

Article 32

Any clause contained in the contract and all special agreements entered into *before the damage occurred* by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. . . . (emphasis added).

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct.

* * * *

APPENDIX E — NIGERIA AIRWAYS TICKETS

NIGERIA AIRWAYS LIMITED PASSENGER TICKET AND BAGGAGE CHECK

ORIGIN PHC DESTINATION PHC

087:4402:944:371 :0

NOT TRANSFERABLE

ISSUED IN EXCHANGE FOR DATE OF ISSUE

ORIGINAL ISSUE

NOT VALID BEFORE NOT VALID AFTER

NOT GOOD FOR PASSAGE

FARE BASIS/ALLOW	CARRIER	FLIGHT/CLASS	DATE	TIME	STATUS
NEW YORK YHR	XD	SK	C	12	P		N
STOCKHOLM YHR	XD	SK	C	12	P		N
AMSTERDAM YHR	XD	KL	C	12	P		N
PORT HARCOURT	XD	KL	C	12	P		N

NOT REFUNDABLE WITHOUT REFERENCE ISSUING OFFICE

FROM/TO	CARRIER	FARE CALCULATION
PHC		
LOS		
NYC		M
IVA		115.00
NYC		
STO		
AMS		25M
PHC		133.33
YHR	SN	75.61

AIRLINE CODE FORM SERIAL NUMBER

PLACE OF ISSUE AGENCY

55 2

17 JUN 82

2765

PORT HARCOURT NIGERIA

FC 233.13

BC-7/UL

NIGERIA AIRWAYS LIMITED PASSENGER TICKET AND BAGGAGE CHECK

ORIGIN PHC DESTINATION PHC

087:4402:944:370 :6

NOT TRANSFERABLE

ISSUED IN EXCHANGE FOR DATE OF ISSUE

ORIGINAL ISSUE

NOT VALID BEFORE NOT VALID AFTER

NOT GOOD FOR PASSAGE

FARE BASIS/ALLOW	CARRIER	FLIGHT/CLASS	DATE	TIME	STATUS
PHC YHR	XD	WT	114	Y	12 FEB	1730	OK
YHR LHR	XD	WT	256	Y	FREE	1230	OK
NEW YORK	XD			Y			
GMPA	XD			Y			
NEW YORK	XD			Y			
YHR	XD						

NOT REFUNDABLE WITHOUT REFERENCE ISSUING OFFICE

FROM/TO	CARRIER	FARE CALCULATION
PHC	WT	
LOS	WT	M
NYC	WT	115.00
IVA		
NYC		
STO		
AMS		25M
PHC	WT	133.33
YHR	SN	75.61

AIRLINE CODE FORM SERIAL NUMBER

PLACE OF ISSUE AGENCY

55

17 JUN 82

2765

PORT HARCOURT NIGERIA

FC 233.13

BC-7/UL

BEST AVAILABLE COPY

APPENDIX F — TRANSCAP DOCUMENT

TRANSCAP TRAVEL BUREAUX NIGERIA

☐ KADUNA
7, Ahmadu Bello Way
P. O. Box 272
Phone: 243082

☐ KANO
12, Hadejia Road
P.M.B. 3036
Telex: 77156
Phones: 4707
4744

☐ LAGOS
CFAO Building (1st Floor)
1, Oladipo Davies Street
P. O. Box 2326
Lagos, Nigeria Telex: 21272
Phones: 660321 660322
660330

☐ PORT-HARCOURT
8 Nnamdi Azikiwe Road
P. O. Box 429.
Telex: 61150
Phone: 330543
335117

ONTACT HARSTRUP (W.A) | PASSENGER NAME/NAMES MR JAN H JHANSSON | L.P.O. | DATE

FFICE LTD PHC. | INVOICES 30494 DATE 12/8/83

OME | TOTAL AMOUNT N1,442.00

EL: | ☐ CASH ☐ CREDIT

UMBER OF SEATS | BILLING TO

ATE SENT TO AIRLINE | TICKET NOS/MCOS 12 1440 3219222/1/2.

From	TO	Carrier	Number	Class	Day	Month	RO/WL	OK	ETD	ETA	REMARKS	Agent
PHC	LOS	WT		Y								
LOS	LGW	BR		Y								
LHR	NYC	TW		Y								
NYC	LAX	TW		Y								
LAX	SEL	KE		Y								
SEL	TPE	CI/KE		Y								
TPE	MNL	CI/PR		Y								
MNL	BKK	PR/PR		Y								
BKK	LHR	BA		Y								
LON	LOS	BR		Y								

LFOG No. PHC WT	VISAS	SPECIAL REQUEST	OTHERS
	UK		

APPENDIX G — *GREIN v. IMPERIAL AIRWAYS, LTD.*, COURT OF APPEAL, ENGLAND, JULY 13, 1936

[Omitted here but submitted separately as Lodging Appendix]